

misdemeanor. Because Collins stipulated that he had a prior conviction for possession of marijuana, the trial court, pursuant to Indiana Code section 35-48-4-11, entered a judgment of conviction for possession of marijuana as a Class D felony. Collins now appeals his conviction. We affirm.

Issues

Collins raises three issues for our review, which we consolidate and restate as follows:

1. Whether, under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution, the trial court properly admitted evidence discovered during Officer Malachi West's pat down search of Collins; and
2. Whether Collins' consent to search was invalid under Article 1, Section 13 of the Indiana Constitution.

Facts and Procedural History¹

At approximately 2:20 a.m. on May 24, 2003, Indianapolis police officer Malachi West was dispatched to 1045 South Villa Street in Indianapolis, Indiana, to investigate a report of shots fired at that location. Officer West was the first officer to arrive on the scene. When Officer West arrived at 1045 South Villa Street, he did not see any persons at that location. The only person that Officer West saw in the area was Collins, who was standing on the front porch of 1040 South Villa Street. 1040 South Villa Street is across the street and three houses north of 1045 South Villa Street. Officer West noted that Collins was knocking on the front door of 1040 South Villa Street, but no one was answering the door. Collins testified that he lived in the neighborhood and had gone to 1040 South Villa Street to return a

bike to his friend who lived there.

Officer West approached Collins at 1040 South Villa Street. Officer West told Collins that he was in the area investigating a report of shots fired. Officer West asked Collins if he had heard anything, and Collins indicated that he had not. Officer West then inquired whether Collins had any weapons on him, and Collins responded that he did not have any weapons. Officer West next asked Collins if he minded if he searched him for weapons. At this point, Officer West was still the only officer on the scene. At a suppression hearing, when asked why he wanted to search Collins, Officer West stated:

I felt that . . . [b]ecause I was all alone and Mr. Collins was the only person on the street and it was highly probable that he might have been the person involved in shooting the firearm. For my safety it was necessary for me to check him for any weapons at that point, so that I can continue my investigation without being injured.

Tr. at 140. Collins told Officer West that he could search him. Officer West then began a pat down search of Collins. During this search, no weapons were found, but Officer West did find a bag of marijuana in the front left pocket of Collins' pants. Officer West immediately knew that the substance in Collins' pocket was marijuana because he could feel a stem poking through. Officer West then placed Collins in handcuffs and waited for other officers to arrive on the scene before he transported Collins to the police station.

The State filed a two-part information against Collins. In part one of the information the State charged Collins with possession of marijuana as a Class A misdemeanor. In part two of the information the State alleged that Collins had a prior marijuana conviction, which,

¹ Oral argument was heard in this case on April 19, 2005, at Indiana State University in Terre Haute, Indiana.

pursuant to Indiana Code section 35-48-4-11, raised the offense from a Class A misdemeanor to a Class D felony.

Collins filed a motion to suppress the evidence obtained from Officer West's pat down search, but the trial court denied this motion. Collins' jury trial began on April 21, 2004. During the trial, Collins' counsel did make a contemporaneous objection to the introduction of the evidence obtained from Officer West's pat down search of Collins, but the trial court overruled this objection. The jury found Collins guilty of possession of marijuana as a Class A misdemeanor. Collins then stipulated that he had a prior conviction for possession of marijuana, and the trial court entered a judgment of conviction for possession of marijuana as a Class D felony. This appeal ensued.

Discussion and Decision

I. The Fourth Amendment and Article 1, Section 11

Collins first argues that the trial court erred in admitting the evidence obtained from Officer West's pat down search because that search violated both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution, and, therefore, that evidence should have been suppressed. We disagree.

A. Standard of Review

Collins essentially argues that the trial court abused its discretion by admitting the evidence obtained from Officer West's pat down search of his person. A trial court has broad discretion in ruling on the admissibility of evidence. Washington v. State, 784 N.E.2d 584,

587 (Ind. Ct. App. 2003). We will only reverse a trial court's ruling on the admissibility of evidence when the trial court has abused its discretion. Id. A trial court abuses its discretion when it makes a decision "that is clearly against the logic and effect of the facts and circumstances before the court." Id.

"Upon review of a trial court's ruling on a motion to suppress and of subsequent admission of the challenged evidence, we must determine whether there is sufficient evidence of probative value in the record which supports the trial court's determination." Justice v. State, 765 N.E.2d 161, 164 (Ind. Ct. App. 2002). We will consider conflicting evidence in a light most favorable to the trial court's ruling. Id. We will not reweigh the evidence or judge witness credibility. Id.

B. Consensual Encounter

In his brief, Collins assumes that when Officer West stopped him, Officer West engaged in an investigatory stop, which thereby implicated the protections of the Fourth Amendment and Article 1, Section 11. The State, however, begins by contending that the protections of the Fourth Amendment and Article 1, Section 11 were not implicated because Officer West's encounter with Collins was not an investigatory stop and is better characterized as consensual.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" It is relevant to note:

[T]here are three levels of police investigation, two which implicate the Fourth Amendment and one which does not. First, the Fourth Amendment requires

that an arrest or detention for more than a short period be justified by probable cause. Probable cause to arrest exists where the facts and circumstances within the knowledge of the officers are sufficient to warrant a belief by a person of reasonable caution that an offense has been committed and that the person to be arrested has committed it. Second, it is well-settled Fourth Amendment jurisprudence that police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based on specific and articulable facts, the officer has a reasonable suspicion that criminal activity “may be afoot.” Accordingly, limited investigatory stops and seizures on the street involving a brief question or two and a possible frisk for weapons can be justified by mere reasonable suspicion. Finally, the third level of investigation occurs when a law enforcement officer makes a casual and brief inquiry of a citizen which involves neither an arrest nor a stop. In this type of “consensual encounter” no Fourth Amendment interest is implicated.

Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), trans. denied (citations omitted). Therefore, when a police officer and a citizen engage in a consensual encounter, the Fourth Amendment is not implicated.

Like the Fourth Amendment, Article 1, Section 11 guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure” Article 1, Section 11 insures the rights of liberty, privacy, and free movement. Taylor v. State, 639 N.E.2d 1052, 1054 (Ind. Ct. App. 1994). “Investigatory stops are intrusions into the privacy of the detained individual and an interference with freedom of movement. Such stops constitute a seizure, and invoke the protections of Article 1, Section 11 of the Indiana Constitution.” Id. (citations omitted). Therefore, although investigatory stops invoke the protections of Article 1, Section 11, consensual encounters between police officers and citizens do not.

Here, the State contends that Officer West’s encounter with Collins was consensual, and, thus, the Fourth Amendment and Article 1, Section 11 were not implicated. The State

concludes that because the Fourth Amendment and Article 1, Section 11 were not implicated, the trial court did not err by admitting the evidence obtained from Officer West's pat down search of Collins.

In order to determine whether a particular encounter is consensual or constitutes an investigatory stop "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Florida v. Bostick, 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 L.Ed.2d 389, 401-02 (1991). "Thus, the test is not determined subjectively by the individual citizen but from the perspective of a reasonable person." Jefferson v. State, 780 N.E.2d 398, 403 (Ind. Ct. App. 2002). So long as an individual engaged by the police remains free to leave, the encounter is consensual. Id. An investigatory stop only begins when an individual no longer remains free to leave. Bovie v. State, 760 N.E.2d 1195, 1198 (Ind. Ct. App. 2002).

It is not the purpose of the Fourth Amendment or Article 1, Section 11 to eliminate all contact between police and the citizenry. Overstreet, 724 N.E.2d at 664. "Not every encounter between a police officer and a citizen amounts to a seizure requiring objective justification." Id. We have previously stated that "[t]o characterize every street encounter between a citizen and the police as a seizure, while not enhancing any interest guaranteed by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." Id. Therefore, we have concluded that so long as the person to whom questions are put remains free to disregard the questions and walk away,

there has been no intrusion upon that person's liberty or privacy that would require some particularized and objective justification. Id.

There are a number of factors we may consider in order to determine whether Officer West's encounter with Collins was consensual or constituted an investigatory stop. In Michigan v. Chesternut, 486 U.S. 567, 575, 108 S.Ct. 1975, 1980, 100 L.Ed.2d 565, 573 (1988), the United States Supreme Court listed the following as possible actions an officer could take which a reasonable person would interpret as an intrusion upon freedom of movement: use of a siren or flashers, a command that the person halt, display of weapons, or operation of a police vehicle in an aggressive manner to either block the person's course or otherwise control the direction or speed of the person. Additionally, we have stated:

Examples of circumstances under which a reasonable person would have believed he was not free to leave include the threatening presence of several officers, the display of a weapon by the officer, some physical touching of the person . . . , or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Overstreet, 724 N.E.2d at 664.

Officer West's encounter with Collins was not an investigatory stop and was consensual. Officer West did not operate his police vehicle in an aggressive manner or use his siren or flashers. Officer West did not order Collins to halt, and he did not prominently display his weapon before Collins. Officer West was also the only officer present at the scene, so Collins was not threatened by the presence of several officers. Furthermore, Officer West did not physically touch Collins until after Collins consented to a pat down search.

Officer West's language did not indicate that compliance with his requests might be compelled. When Officer West approached Collins, he first explained to Collins that he was in the area investigating a report of shots fired. He asked Collins if he had seen anything, and Collins said that he had not. Officer West inquired whether Collins had any weapons, and Collins said he did not. Officer West then asked if Collins minded if he searched him for weapons, and Collins consented to the search. Thus, Officer West requested permission to search Collins rather than demanding or requiring Collins to consent to a search.

After considering all of the circumstances surrounding Officer West's encounter with Collins, we cannot say that Officer West's conduct would have communicated to a reasonable person that he or she was not free to decline the officers' requests or otherwise terminate the encounter. Therefore, the trial court properly admitted the evidence discovered during Officer West's pat down search of Collins because Officer West and Collins' encounter was consensual and did not implicate the Fourth Amendment or Article 1, Section 11.

II. Article 1, Section 13

Collins next argues that, pursuant to Article 1, Section 13 of the Indiana Constitution, his consent to search given to Officer West was invalid. Article 1, Section 13 guarantees criminal defendants the right to counsel. Pirtle v. State, 263 Ind. 16, 26, 323 N.E.2d 634, 639 (1975). In Pirtle, our supreme court held that "a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent." Id. at 640. "Merely giving an arrestee

the Miranda advisement before interrogation is insufficient to inform him of his right to consult with counsel before consenting to a search.” Torres v. State, 673 N.E.2d 472, 474 (Ind. 1996). At trial, the State bears the burden of proving that a custodial defendant expressly authorized the search after being advised of his or her right to consult counsel before consenting to the search. Id.

Here, Officer West asked Collins if he could search him for weapons, and Collins consented to this search. Collins contends that he was in police custody at the time Officer West searched him. Because he was in custody and because he did not authorize Officer West’s search after having been advised of his right to consult with counsel before consenting to the search, Collins argues that his consent to search was invalid pursuant to Article 1, Section 13. The State argues that Article 1, Section 13 was not violated because Collins was not in custody when Officer West searched him.

Whether a defendant is in custody for purposes of Article 1, Section 13 is governed by an objective test. West v. State, 755 N.E.2d 173, 178 (Ind. 2001). The question ultimately is whether a reasonable person under the same circumstances would have believed that he was under arrest or not free to resist the entreaties of the police. Id. at 178-79. Several circumstances have been held to be relevant to this issue: (1) whether the defendant is read his or her Miranda rights or handcuffed or restrained in any way, and the manner in which the defendant is interrogated; (2) whether a person freely and voluntarily accompanies police officers; (3) the point at which the defendant is arrested for the crime under investigation; (4) the length of the detention; and (5) the police officer’s perception as to the defendant’s

freedom to leave at any time. Id. at 179.

Collins' rights under Article 1, Section 13 were not violated because he was not in custody. Collins admits that Officer West did not read him his Miranda rights before he searched him. Additionally, Officer West did not handcuff or restrain Collins in any way before he searched him. The manner in which Officer West interrogated Collins also suggests that Collins was not in custody. Officer West testified that he asked Collins if he minded if he searched him for weapons. Thus, Officer West requested permission from Collins to conduct a pat down search of his person. If Collins had been in custody, Officer West would have simply required Collins to consent to a search rather than requesting his permission.

We conclude that a reasonable person facing the same circumstances encountered by Collins would not have believed that he or she was under arrest. Therefore, Collins' consent to search given to Officer West was not invalid under Article 1, Section 13 because Collins was not in police custody at the time he consented to the search.

Conclusion

The trial court properly admitted the evidence discovered during Officer West's pat down search of Collins because Officer West and Collins' encounter was consensual and did not implicate the Fourth Amendment or Article 1, Section 11. We also hold that Collins' consent to search his person given to Officer West was not invalid under Article 1, Section 13 because Collins was not in police custody when he consented to the search. Collins' conviction for possession of marijuana as a Class D felony is therefore affirmed.

Affirmed.

RILEY, J., and CRONE, J., concur.